

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

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Docket No.
CA 77-4139

Respondent. :

FILED
FEB 17 1978
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

February 1978

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

CARLOS EDUARDO VINCENT-LOOR,

Petitioner

-against-

U.S. IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent

Docket No. 77-4189

PETITIONER'S BRIEF

STATEMENT OF THE ISSUES

1. Whether the Board of Immigration Appeals violated the Temporary Restraining Court Order because the petitioner who previously established priority date based on the same family relationship is entitled to that priority date and accordingly is entitled to the relief contained in *Silva et al v. Levi, et al* (U.S.N.D.Ill.E.D. Civ.76-C-4268)
2. Whether the petitioner is being deprived due process of law due to the Immigration Service's unreasonable delay in adjudicating the I-130 petition filed on his behalf and whether this action unjustly precludes the petitioner from having his application for adjustment of status adjudicated.

STATEMENT OF FACTS OF THE CASE

Petitioner is a 27 year-old single male alien, a native and citizen of Ecuador, who entered the United States at New York, N.Y. on February 8, 1971. He was admitted as an immigrant upon presentation of an immigrant visa issued to him in Ecuador on February 5, 1971. The visa was issued on the basis of his status as the unmarried male minor child of a lawful permanent resident of the United States and exempt under Section 212(a)(14) from the requirement that an immigrant present a labor clearance. However, before the visa was issued, petitioner married one Yazmin de la Mercedes Granda-Barba on February 4, 1971 at Guayaquil, Ecuador. The visa issued to the petitioner did not contain a labor certification because it is noted to show him as the exempt minor child of a lawful resident. The Form FS546 which is a warning to a minor child as to marriage was in English and signed by the applicant, although he did not speak English at the time and the said form are to be given in Spanish if the applicant speaks Spanish. Subsequent to his entry, U.S. Immigration and Naturalization Service initiated deportation proceedings against petitioner based on a charge of Section 241(a)(1). The Immigration Judge on March 28, 1973 in his decision granted petitioner the privilege of voluntary departure which was affirmed by the Board of Immigration Appeals on September 27, 1974. Then on January 16, 1975, petitioner's attorney moved to reopen this deportation proceeding

based on petitioner's final annulment decree dated January 9, 1975 from Queens, New York annulling petitioner's marriage to Yazmin de la Mercedes Granda-Barba. The reopening was granted by the Board of Immigration Appeals on May 8, 1975 which remanded the matter to the Immigration Judge. On September 27, 1976, the Immigration Judge's decision in the reopened hearing resulted in a deportation order against the petitioner which was appealed to the Board of Immigration Appeals by petitioner's Counsel. Subsequently, on January 1, 1977, the new immigration law came into effect and accordingly petitioner was eligible for second preference status to wit, the unmarried son of a legal permanent resident mother. In response thereto, petitioner filed an I-130 petition and I-485 adjustment of status application on January 21, 1977. It should be noted that at the date of this brief, petitioner's I-130 petition has not been adjudicated although similar chronological I-130 petitions have been adjudicated by the U.S. Immigration Service. While the appeal was pending a motion to reopen the deportation proceedings was made to the Board of Immigration Appeals on the grounds that the relative petition and application for adjustment of status was filed since January 21, 1977 and should be adjudicated by the Immigration Judge. The Board of Immigration Appeals reversed the Immigration Judge's decision and reinstated voluntary departure status to petitioner in its decision of June 9, 1977, and denied the motion to reopen for the purpose of remanding for adjudication the relative petition and application for adjustment of status. Subsequently, a warrant of deportation

was issued for petitioner on October 13, 1977. In a Motion for a Stay of Deportation dated October 25, 1977, petitioner's counsel urged that petitioner was a Silva v. Levi alien and thus could not be deported. The U.S. Immigration Service refused to acknowledge such and this refusal and the prior proceedings related herein give rise to this petition of review now before this Court.

ARGUMENT

POINT I

The Petitioner who previously established a priority date based on the same family relationship is entitled to that priority date and accordingly is entitled to the relief contained in *Silva et al v. Levi, et al* (U.S. N.D. Ill. E.D. Civ. 76-C-4268)

22 CFR 42.62 (c) and (d) enunciates two propositions that give credence to petitioner's contention that he is entitled to a priority date prior to January 1, 1977.

Paragraph (c)

(c) Notwithstanding the provisions of paragraphs (a) and (b) of this section an alien who prior to January 1, 1977 was subject to the numerical limitation specified in section 21 (e) of the Act of October 3, 1965 and who registered as a Western Hemisphere immigrant with a priority date prior to January 1, 1977 shall retain such priority date as a nonpreference immigrant pursuant to section 203 (a)(8) of the Act.

states that a Western Hemisphere immigrant with a priority date prior to January 1, 1977 shall retain such priority date. Since petitioner's I-550 was filed before his entry to the United States on February 8, 1971, it can be safely asserted that petitioner's priority date precedes his February 8, 1971 entry. Additionally, paragraph (d)

(d) Notwithstanding the provisions of paragraphs (a) and (b) of this section, a spouse or child of a principal alien acquired prior to his admission into the United States is entitled to the priority date of the principal alien, whether or not named in the immigrant visa application of the principal alien. A child born of a marriage which existed at the time of the principal alien's admission to the United States is considered to have been "acquired" prior to the principal alien's admission."

states that a child of a principal alien acquired prior the latter's to admission into the United States is entitled to the priority date of the principal alien. Since the petitioner's mother entered the United States on April 26, 1970, the interpretation of paragraph (d) would entitle the petitioner to derivatively utilize his mother's priority date. Both cumulative and separate interpretations of the afore-mentioned paragraphs of 22 CFR 42.62 (c) and (d) would entitle the petitioner to a priority date earlier than January 1, 1977.

The Temporary Restraining Order as of April 1, 1977 contained in Silva et al v. Levi et al (US ND, Ill E.D., Civ. 76-C-4268), prohibits the Immigration Service and the Board of Immigration Appeals from continuing any efforts to expel a Western Hemisphere alien with a priority date between July 1, 1968 and December 31, 1976 from the United States. This prohibition is reiterated by the Honorable David Milhollan,

Chairman of the Board of Immigration Appeals in a Interpreter
Release of September 12, 1977 based on speech made on May 30,
1977 to the association of Immigration Lawyers

"I would like now to take a few moments to discuss our procedures in cases involving the court's decision in Silva v. Levi. Those cases which contain evidence of a priority date between July 1, 1968 and December 31, 1976 involve aliens in the class covered by the court's decision in Silva. Pursuant to the court's order we have suspended our consideration of the merits in those cases and in form order have remanded them to the Service. All other decisions in cases involving Western Hemisphere natives in which deportation is ordered are cases involving Western Hemisphere natives in which deportation is ordered are accompanied by copies in Spanish and English of the notice ordered by the Court in Silva v. Levi."

Although paragraph (4) and (5) of the preceeding order states certain instances where the Immigration Service or the Board of Immigration Appeals can expel Silva v. Levy (supra) aliens, such actions can occur only when the alien is clearly not eligible for an Immigrant visa. This definitely is not the case here for the petitioner is clearly eligible for an immigrant visa based on a second preference I-130 petition filed on January 21, 1977 as the unmarried son of a legal permanent resident mother. Thus the Immigration Service and the Board of Immigration Appeals actions towards the petitioner are in violation of the Silva v. Levi (supra) order, and constitute an erroneous interpretation of law which mandate reversal.

POINT II

The Petitioner is being deprived due process of law due to the Immigration Service unreasonable delay in adjudicating the I-130 petition filed on his behalf and this action unjustly precludes the petitioner from applying for 245 adjustment relief.

On January 21, 1977 the petitioner's mother filed an I-130 and I-485 adjustment of status application on his behalf based on second preference eligibility , to wit: unmarried son of a legal permanent resident. Up until the date of this brief, the aforesaid petition has not been adjudicated. This is an incredulous situation considering the processing time communicated by the Immigration Service to the Association of Immigration and Nationality Attorneys. As stated in its report of August 25, 1977, the processing time for I-130 cases is six months.

I-130 cases: (no change in adjudication time last reported 8/1/77): spouse, Stepchildren and Arab cases, requiring interview, beneficiary in the U.S., 6 months; beneficiary outside of the U.S., 6 months. Readily approved cases, beneficiary in or outside of the U.S., adjudicated at the New York District Office, current., Readily approved cases, beneficiary outside of the U.S., adjudicated at Border Ports, current.

Petitioner's attorney has made numerous requests to the I-130 unit concerning the adjudicatory status of the aforesaid petition but such attempts have proven to be fruitless. The paramount importance of petitioner's I-130 should be noted

In the Board of Immigration Appeals' decision of June 9, 1977, the Board denied petitioner's motion to reopen on account of 8 CFR 245.1cd) to wit:

"An applicant who claims immediate relative status... is not eligible for the benefits of section 245 of the Act unless he is the beneficiary of a valid unexpired visa petition filed in accordance with Part 204 of this chapter and approved to accord him such status."

The failure of the Immigration Service to adjudicate petitioner's I-130 in accordance with established adjudicatory time processing periods raises the permissible inference that the Immigration Service has been dilatory in its statutory duty to process I-130 petitions in chronological order of filing. This aforesaid conduct by the Immigration Service effectively precludes the petitioner from reopening his deportation hearing based on *prima facie* eligibility for Section 245 adjustment benefits. In Corniel-Rodriguez v. INS 532 F2d 301 (2nd Circuit, 1976), the Court stated "a fundamental and unquestioned principle of our jurisprudence is that no one shall be permitted to take advantage of his own wrong". In this case, the Court found that the failure of an immigration official to perform a duty affirmatively required by statute estopped the government from deporting the alien. A similar situation exists in the matter before this court. The Immigration Service's failure to adjudicate petitioner's I-130 petition according to established procedure creates a severe act of affirmative government misconduct that

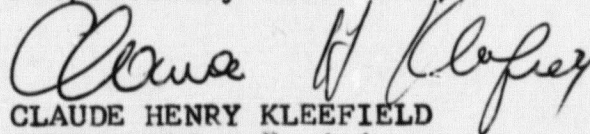
precludes a right created by Congress (i.e.:245 adjustment hearing) and accordingly the rules of estoppe should be applied, INS B Hibi 414 U.S. 5(1973), Santiago v. INS 526 F2d 488 (9M Circuit 1975). The government should be estopped from deporting petitioner due to its dilatory actions in its failure to adjudicate petitioner's I-130 petition and thus precluding petitioner's 245 motion to reopen. Such conduct deprives petitioner of due process of law and cannot and should not be condoned.

CONCLUSION

Based on the foregoing discussion, the Order of the Board of Immigration Appeals should be vacated and (1) deportation proceedings terminated or (2) Remanded for adjudication to the Board of Immigration Appeals and for such other and further relief as may be appropriate.

New York, N.Y.
February 17, 1978

Respectfully submitted,



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REGULATIONS CITED

Code of Federal Regulations

22 CFR Section 42.62 (a) (b) (c) (d)

(a) The priority date of a preference visa applicant shall be the filing date of the approved petition which accorded him that preference.

(b) The priority date of other applicants shall be -

(1) The date that an individual labor certification under Section 212 (a) (14) of the Act has been granted for the applicant, or

(2) The date of submission to the consular officer or to Immigration and Naturalization Service in appropriate cases of evidence to establish that:

(i) The applicant is within one of the professional or occupational groups listed in Schedule A, or

(ii) Circumstances specified in Section 42.91 (a) (14) (ii) are applicable to the applicant and that he is therefore not within the purview of section 212 (a) (14) of the Act.

(c) Notwithstanding the provisions of paragraphs (a) and (b) of this section, an alien who prior to January 1, 1977 was subject to the numerical limitation specified in section 21(e) of the Act of October 3, 1965 and who was registered as a Western Hemisphere immigrant with a priority date prior to January 1, 1977 shall retain such priority date as a nonpreference immigrant pursuant to section 203 (a) (8) of the Act.

(d) Notwithstanding the provisions of paragraphs (a) and (b) of this section, a spouse or child of a principal alien acquired prior to his admission into the United States is entitled to the priority date of the principal alien, whether or not named in the immigrant visa application of the principal alien. A child born of a marriage which existed at the time of the principal alien's admission to the United States is considered to have been "acquired" prior to the principal alien's admission.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

REFUGIO SILVA, et al.,

Plaintiffs

vs.

EDWARD LEVI, et al.,

Defendants.

NO. 76 C 4268

TEMPORARY RESTRAINING ORDER

This cause having come before this Court, and it appearing from the record that the factors which were the bases for this Court's decision to enter in this cause on March 10, 1977, a Temporary Restraining Order continues to exist and the Defendants having consented to entry of this Temporary Restraining Order until further order of this Court;

It is therefore ORDERED, ADJUDGED, and DECREED:

1. Except as specifically provided in this order, any alien from an independent country of the Western Hemisphere who is known by the Immigration and Naturalization Service (hereinafter INS) to have a priority date for the issuance of an immigrant visa between July 1, 1968, and December 31, 1976, inclusive, shall be permitted by the Immigration and Naturalization Service to remain in the United States and the Immigration and Naturalization Service shall not begin, continue or conclude any effort to expel such an alien. The prohibited efforts include, but are not limited to, detention, requiring the posting of bond, issuing orders to show cause, holding deportation hearings,

entering deportation orders, terminating voluntary departure, issuing warrants of deportation, dehying stays of deportation, and issuing bag and baggage letters (Form I-166).

2. Any alien known to the INS to be a native of an independent country of the Western Hemisphere who hereafter has contact with the INS shall be informed by the INS in writing that such person may have rights under this order.

3. No alien who entered the United States on or after March 11, 1977, shall be protected by this order. However, the INS shall apply its usual policies and procedures concerning the application of discretion in determining the length of time the alien may be permitted to remain in the United States.

4. The INS may begin, continue or conclude any effort to expel an alien otherwise protected by this order, including the taking of any of the efforts specifically mentioned in paragraph 1, if:

- (a) the regional commissioner or acting regional commissioner personally concludes that the alien's continued presence in the United States would be contrary to the national interest or security, in which case that official shall set forth in writing all his reasons for reaching that conclusion; or
- (b) the regional commissioner or acting regional commissioner personally concludes, after due consideration of possible waivers of grounds of excludability and of permission to reapply for

admission pursuant to Section 212(a)(16) & (17) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(16) & (17), that an alien is clearly not eligible for an immigrant visa under Section 212(a)(15), (16), (17) or (19) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(15), (16), (17) or (19), in which case that official shall set forth in writing all his reasons for reaching that conclusion and shall give the alien a minimum of seven days notice before the INS proceeds with any effort to expel the alien; or

- X (c) the District Director, Acting District Director, or Deputy District Director, personally concludes, after due consideration of possible waivers of grounds of excludability, that the alien is clearly not eligible for an immigrant visa on any grounds other than those specified in subparagraphs (a) and (b) above, in which case that official shall set forth in writing all his reasons for reaching that conclusion.

5. The Board of Immigration Appeals shall not dismiss an alien's appeal nor sustain an INS appeal in a deportation case in which the record of proceedings clearly shows that the alien is a native of an independent country of the Western Hemisphere and has a priority date for the issuance of an immigrant visa between July 1, 1968, and December 31, 1976, inclusive, unless: (1) the alien entered the United States after March 10, 1977; or (2) the Board determines:

after due consideration of possible waivers of inadmissibility, and of permission to reapply for admission, pursuant to Section 212(a)(16) and (17) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(16) and (17), that the alien is clearly not eligible for an immigrant visa; or (3) the regional commissioner or acting regional commissioner informs the Board in writing that the alien's continued presence in the United States would be contrary to the national interest or security. In any case involving a native of an independent country of the Western Hemisphere in which the record does not clearly show that the alien has a priority date between July 1, 1968, and December 31, 1976, inclusive, the Board may adjudicate the case without restriction, but shall enclose a copy of the following notice in both English and Spanish with its order:

Regardless of the enclosed decision, you may be allowed to stay in the United States because of a recent court ruling if you registered with an American consul for an immigrant visa before January 1, 1977, and entered the United States prior to March 11, 1977. The court ruling relates to the case of Silva v. Levi, 76 C 4268 (N.D.Ill.).

Please contact your attorney or authorized representative or an INS office for further information.

6. Nothing in this order shall prevent a deportation hearing from being held, nor a decision from being rendered by a special inquiry officer (Immigration Judge) in any case in which the alien seeks relief under either Section 244(a) or Section 245 of the Immigration and Nationality Act, 8 U.S.C. §1254(a) or §1255, or seeks any other form of relief from deportation. The enforcement of any resulting decision that may be unfavorable to the alien is subject to the terms of this order.

7. The INS shall promptly authorize in writing the employment of any alien who is permitted to remain in the United States in accordance with this order. Written employment authorization shall be granted within 2 days after an INS district or suboffice, which is a files control office or whose officer in charge has authority to issue orders to show cause in deportation proceedings receives a request for employment authorization submitted in person by an alien who is satisfactorily identified as one who is protected by this order.

8. The INS shall promptly supply each person who is permitted to remain in the United States pursuant to this order a copy of the attached notice in English and Spanish, marked as Exhibit A.

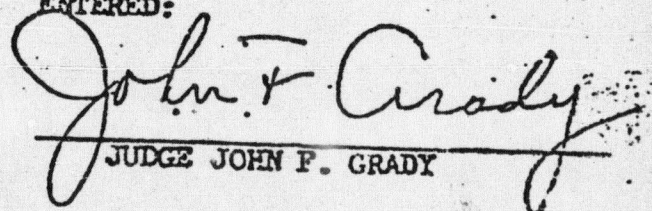
9. The purpose of this Temporary Restraining Order is to maintain the status quo as to those members of the class earlier certified by this Court who are not clearly ineligible for an immigrant visa. Any determination that an alien is protected or is not protected by this order shall not be binding at the time the alien seeks actual issuance of an immigrant visa or adjustment of status.

10. The INS shall promptly communicate in writing the text of this order to its regional, district and suboffices, which are files control offices or whose officer in charge has authority to issue orders to show cause in deportation proceedings, and to the Board of Immigration Appeals.

11. This Temporary Restraining Order is entered without requirement that plaintiffs or members of their class post bond or security for costs or damage.

12. This Temporary Restraining Order supersedes all previous Temporary Restraining Orders entered in this cause.

DATED: APR. 1 1977

ENTERED:

JUDGE JOHN F. GRADY

IMPORTANT NOTICE

Date: _____

Re: Name _____

A- _____

Due to a court order in Silva v. Levi, 76 C 4268, entered by District Judge John P. Grady in the District Court for the Northern District of Illinois, we are taking no action on your case. This means that you are permitted to remain in the United States without threat of deportation or expulsion until further notice.

Your employment in the United States is authorized.

District Director/
Officer in Charge

EXHIBIT A